IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, *et al.*,

Appellants,

—against—

NANCY REMILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL WELFARE RIGHTS ORGANIZATION, THE NLSP CENTER ON SOCIAL WELFARE POLICY AND LAW, INC., AND THE AMERICAN VETERANS COMMITTEE, INC.

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Welfare Rights Organization, the NLSP Center on Social Welfare Policy and Law, Inc., and the American Veterans Committee, Inc. respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons also disclose the interest of the *amici*.

The *amici* wish to assure that the Court is presented with a complete discussion of the very important Social Security Act issues raised by this case in view of the impact on the financial security of thousands of welfare recipients and applicants around the country who are the families of the men who are serving in our Armed Forces. The manner in which this case is resolved may well affect many other welfare recipients and applicants who are not in the families of servicemen but who are eligible for bene-

fits under the principles announced by this Court in *Townsend* v. *Swank,* 404 U.S. 282 (1971). This possible effect, and the necessity for this *amicus* brief, became apparent only after the Solicitor General filed an *amicus* brief in this case on March 20, supporting appellants but filed after appellants had submitted their brief.* Because the United States' brief calls into serious question and, we believe, portrays a serious misunderstanding of, this Court's recent decision in *Townsend* v. *Swank, amici* believe that a further amplification of the statutory issues under the Social Security Act, and in particular a response to the United States' position, is essential to a full understanding of the case and its effect.

The National Welfare Rights Organization (NWRO) was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of NWRO includes more than 125,000 members in 50 states. Since many of its members have been, and continue to be, adversely affected by regulations which deny welfare benefits to families in violation of the requirements of the Social Security Act, the Organization has devoted much of its energies and resources to the abolition of such arbitrary rules. Members of NWRO have appeared as individual plaintiffs before this Court

* Moreover, we note that appellees' brief was due only a few days later, and thus appellees did not have an opportunity to respond to the Solicitor General. Recognizing that the motion and brief are being filed shortly before oral argument, *amici* mailed air mail special delivery a typewritten copy to both the appellants' and the appellees' counsel, as well as to the Solicitor General, at the same time that the final copy was delivered to the printer, April 4.

on many occasions; the Organization also submitted briefs *amici curiae* in *Lewis* v. *Martin,* 397 U.S. 552 (1970), and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). And, in the case most relevant to the issues in this case, *Townsend* v. *Swank,* attorneys for NWRO represented the successful appellants.

The NLSP Center on Social Welfare Policy and Law, Inc. is the specialized welfare law resource of the Legal Service Program of the Office of Economic Opportunity. The Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs and other legal organizations through education and assistance in the preparation of important litigation. Since its inception in 1965 Center attorneys have represented parties, and the Center has participated as *amicus curiae,* in this Court and the lower courts in cases involving all facets of welfare law. Specifically, the Center participated as *amicus* in this Court in *King* v. *Smith,* 392 U.S. 309 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970); *Dandridge* v. *Williams, supra,* and *Lewis* v. *Martin, supra;* and Center attorneys represented welfare clients before the Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Rosado* v. *Wyman,* 397 U.S. 397 (1970); and *Jefferson* v. *Hackney,* October Term, 1971, No. 70-5064, *sub judice.*

The American Veterans Committee, Inc. (AVC) is a nation-wide organization of servicemen and veterans who served honorably in the Armed Forces of the United States during World War I, World War II, the Korean Conflict, and the Vietnam Conflict, and who have associated themselves regardless of race, color, religion, sex or national

origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943, and has dedicated itself to the attainment of equal rights and opportunities for all citizens, whether rich or poor, servicemen or civilians. Among the many cases in which the AVC has filed briefs in this Court are *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Brown* v. *Board of Education*, 347 U.S. 483 (1953) and 349 U.S. 294 (1955); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Takahashi* v. *Fish and Game Commn.*, 334 U.S. 410 (1948); *Stainback* v. *Poe*, 336 U.S. 368 (1949); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); and *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

Introduction

In our view, the narrow question presented in this case is whether California may automatically disqualify for AFDC benefits otherwise eligible families solely because the father is continuously absent from the home as a result of service in the Armed Forces. None of the parties to the case has raised any question as to whether or not a state may determine that such service does not render the father continuously absent under the circumstances of a particular case, nor do we.

The appellants' answer to the question presented is set out in the alternative. First, they argue that the definition of "continued absence" as used in 42 U.S.C. §606 has been left by Congress to the states, and thus within that broad delegation California had the discretion under the Social

Security Act to exclude military absences. Second, appellants urge that if the definition of "continued absence" was not left to state discretion, then that phrase should be construed by the Court to exclude military absences from its scope. The Solicitor General, in his *amicus curiae* brief for the United States, assumes that Congress intended to *permit* military absences to be considered as "continued absences" under Title IV, but that the precise scope of the term was to be left to each state to determine.[1] This *amicus* brieffully supports the position of appellees, and will demonstrate that under this Court's decision in *Townsend* v. *Swank, supra,*[2] the *federal* standard of "continued absence" is controlling, and that Congress intended by the words "continued absence" to include within its terms *any* uninterrupted absence from the home. We believe that the clear wording of the statute, the legislative history, and the problem to which the Act was addressed, all point to the inclusion of military absences under the statute.

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[1] The Solicitor General has taken what has become his usual posture before this Court when representing the views of the Department of Health, Education and Welfare, namely, that prior decisions of the Court with which it does not agree, cannot possibly have been intended by the Court. Thus, in *Townsend* v. *Swank,* 404 U.S. 282 (1971), the Court was advised that the interpretation of 42 U.S.C. §§602(a)(10) and 606, in *King* v. *Smith,* 392 U.S. 309 (1968), should not be read as its plain language seemed to indicate, and in *Jefferson* v. *Hackney,* No. 70-5064, *sub judice,* the Court was told that its clear language in both *Rosado* v. *Wyman,* 397 U.S. 397 (1970) and *Dandridge* v. *Williams,* 397 U.S. 471 (1970), was *dicta* and not intended by the Court. And now, in the instant case, the *Townsend* decision, and its explicit repudiation of HEW's position, is wished away by the Government.

[2] The question in *Townsend* involved the consistency of Illinois' restriction of AFDC for children 18-20 years of age to those children attending high school or vocational school, with the Social Security Act, which includes college students in that age group as dependent children. The Court held that the federal definition was binding, and thus the Illinois restriction was void under the Supremacy Clause.

ARGUMENT

I.

This Court's decision in *Townsend* v. *Swank* requires that all children eligible for AFDC under *federal* criteria be granted assistance.

In *Townsend,* the Solicitor General argued that the Social Security Act permits the states to define eligibility in terms narrower than the statute's definition of dependent children, and that *King* v. *Smith* stood at most for the proposition that state eligibility restrictions are impermissible only if incompatible with articulated Congressional purposes or result in unreasonable classifications. Brief for the United States as Amicus Curiae, *Alexander* v. *Swank,* Nos. 70-5032, 70-5021, and *Carter* v. *Stanton,* No. 70-5082, dated August, 1971, pp. 10-12, 15. Thus the Government urged, in effect, the adoption of a presumption in favor of state options regarding AFDC coverage, with federal criteria governing only where explicit authority for such a limitation is found, or where the vague "condition (x)" or "equitable treatment" doctrine would so dictate. *Id.* at pp. 21-28.

In *Townsend,* however, the Government's position was expressly rejected by the Court:

> "*King* v. *Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC

standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." 404 U.S. at 286.

In so ruling, the Court reversed the proposed presumption. Eligibility for AFDC must be determined using *federal* standards unless evidence of a contrary Congressional intent is clearly shown for the particular exclusion.[3] The HEW "condition (x)" doctrine was disapproved insofar as it permitted the denial of AFDC to federally eligible individuals. *Ibid.*

In the instant case, the Government seeks to distinguish *Townsend* by arguing that in that case there was *specific* indication in the Act that college students were to be eligible, as well as legislative history indicating an intent to require their inclusion, and it was only that specificity and history which compelled the conclusion that states may not

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[3] This interpretation of *King* had been anticipated by many lower federal courts which had occasion to consider the question, see, *e.g.*, *Stoddard* v. *Fisher*, 330 F. Supp. 566 (D. Me. 1971); *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970); *Cooper* v. *Laupheimer*, 316 F. Supp. 364 (E.D. Pa. 1970); *Damico* v. *California*, 2 CCH Pov. L. Rep. ¶10,478 (N.D. Calif. Sept. 12, 1969); *Doe* v. *Hursh*, 328 F. Supp. 1360 (D. Minn. 1970); *Doe* v. *Schmidt*, 330 F. Supp. 159 (E.D. Wisc. 1971); *Saddler* v. *Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Taylor* v. *Martin*, 330 F. Supp. 85 (N.D. Calif.), *aff'd sub nom. Carleson* v. *Taylor*, 92 S. Ct. 446 (1971); *Woods* v. *Miller*, 318 F. Supp. 510 (W.D. Pa. 1970); *Arizona State Dept. of Public Welfare* v. *HEW*, 449 F.2d 456 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3399 (Feb. 22, 1972); *Doe* v. *Swank*, 332 F. Supp. 61 (N.D. Ill. 1971), *aff'd sub nom. Weaver* v. *Doe*, 92 S. Ct. 537 (1971); *Meyers* v. *Juras*, 327 F. Supp. 759 (D. Ore.), *aff'd*, 404 U.S. 803 (1971); but see *Digesualdo* v. *Shea*, —— F. Supp. ——, No. C-1827 (D. Colo. March 1, 1971), *vacated and remanded for further consideration in light of Townsend* v. *Swank*, 92 S. Ct. 688 (1972); and by at least one law review commentator, see Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of *King* v. *Smith*," 118 Penn. L. Rev. 1219 (1970).

more narrowly define eligibility in terms of school attendance. Memorandum for the United States as Amicus Curiae, dated March, 1972, pp. 6-7. On the other hand, in the Government's view, the Social Security Act does not "elaborate" on the scope of "continued absence," and there is allegedly no legislative history on the question of either its intended scope, or its mandatory nature. It is concluded by the Government, therefore, that states were thus "intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance." *Id.* at 7.

It should be immediately apparent that the Government's analysis of the question presented is identical to that which it proposed in *Townsend* and which was rejected, namely, a presumption in favor of state options and state flexibility absent specific mandates to the contrary. A fair reading of the *Townsend* opinion, and of *King* v. *Smith*, conclusively demonstrates that the general eligibility rule enunciated in those cases in no way depended upon the clarity or specificity of the Congressional will in regard to the particular eligibility issue involved, and that the Congressional purpose was looked to in those cases *only* to determine whether or not explicit authorization for state options justified departure from the general rule as to the applicability of federal eligibility standards [*Townsend*], and to determine the precise scope of the governing federal criteria [*King*].

First, the structure of the Court's opinion in *Townsend* itself negates the Government's interpretation of that decision. Section I of the decision, 404 U.S. at 285-86, deals *exclusively* with the Court's interpretation of §402 (a)(10), 42 U.S.C. §602(a)(10), requiring AFDC to be

"furnished with reasonable promptness to all eligible individuals." In that section the decision in *King* v. *Smith* was analyzed. The Court characterized *King* as involving the question of whether Alabama could treat a man who cohabited with a mother of needy dependent children as a nonabsent "parent" so as to disqualify such children for AFDC, since under such circumstances no "parent" would be "continually absent from the home" as required by §406(a), 42 U.S.C. §606(a). In *Townsend* the Court noted that in *King* it had invalidated this Alabama definition of "parent" since its inconsistency with the Court's interpretation of §406(a) meant that eligible children were denied aid in violation of §402(a)(10). *Townsend,* 404 U.S. at 286.[4] The Court concluded that *King* established the primacy of federal eligibility standards absent specific congressional authority for state departures therefrom. *Ibid.*

This initial section of the *Townsend* decision thus makes no reference whatsoever to the particulars of the eligibility issue involved in that case. Indeed, Section II of the *Townsend* decision begins as follows:

> *"It is next argued* that in the case of the 18-20-year-old needy dependent children, Congress authorized the States to vary eligibility requirements from federal standards." 404 U.S. at 287. (Emphasis added.)

It is here, for the first time, that the Court considered it relevant to look to the legislative history, 404 U.S. at 287-91,

[4] The Court's characterization of the *King* holding quoted from a passage in that opinion (392 U.S. at 333) which was relied on by appellants in *Townsend* in support of their argument that the Act imposes federal eligibility standards on the states. The Solicitor General's brief in that case (at p. 25) argued that that passage "was taken out of context and misinterpreted" by the *Townsend* appellants. Surely the Government's interpretation of *King,* not even cited in its brief in this case, has been repudiated.

and it did so *only* to determine if specific Congressional authorization for the departure from the general federal eligibility rule could be found so as to sanction state options. This latter discussion was not undertaken in order to formulate the general rule, however. *King* had already done that for the Court.

The nature of the precise issue presented in *King* also confirms our position that the eligibility rule set out in *Townsend* did not depend on the peculiar specificity of the provisions at issue in that case. Required for resolution in *King* was the meaning of the word "parent." The Court in *King* looked to the legislative history of the Social Security Act in order to decide what Congress intended by use of the word "parent," and concluded it meant only a person with a legal duty to support a needy child. Surely, the word "parent" is not so clear in its meaning to justify the conclusion that the federal standard is binding *merely because of the specificity of language used.* "Parent," after all, may or may not include "adoptive" parent, "step-parent," or "man assuming the role of a spouse," even assuming it does not reasonably include within its terms "substitute" parents. See, for example, *Lewis* v. *Martin*, 397 U.S. 552 (1970).[5]

Thus, if the Government's position in the instant case were correct, considering the lack of specificity to the word "parent," all that the legislative history in *King* would have required was a rule of law which prohibited federal

[5] For a listing of those states which at the time of the *Lewis* decision, and *after King*, were still assuming the availability of income from a stepparent or a man assuming the role of spouse as if they were in the same position as natural parents, see Brief *Amici Curiae* of the Center on Social Welfare Policy and Law, *et al.*, *Lewis* v. *Martin*, O.T. 1969, No. 829, appendix.

matching for payments to families with two adults residing at home who have child support obligations (i.e., the limits of federal matching), while maintaining state flexibility to *restrict* eligibility by defining "parent" more broadly than permitted by the federal criteria. Nothing in the legislative history reviewed by the Court, after all, indicated a Congressional command to aid *all* children with absent parents, as so defined. See *Stoddard* v. *Fisher, supra,* 330 F. Supp. at 570.

However, the Court did not rule that §406 merely delimited the extent of the availability of federal matching funds, but instead mandated that *all* children eligible under the federal criteria must be aided. *Ibid. King* thus compels affirmance of the judgment in this case, since it applies the federal standard in a case in which that standard was not "elaborated" upon in the statute. It is curious, that in articulating its position that states have broad options to define eligibility unless Congress has spoken to the contrary, the Government fails, as we have noted, to even cite *King* v. *Smith!*

Further evidence that the degree of Congressional elaboration on terms used in the definition of dependent child is irrelevant to the function which must be ascribed to that definition, may be gleaned from the expansion of that definition in 1961. In that year, §407, 42 U.S.C. §607, was added to the Act in order to include as a "dependent child" any needy child who meets the requirements of §406 and "who has been deprived of parental support or care by reason of the unemployment (as defined by the State)" of one of his parents. Pub. L. 87-31, §1, 75 Stat. 75.[6]

[6] In 1968 the term was restricted to include only children deprived of support or care by reason of the unemployment of their father. Pub. L. 90-248, §263(a).

While it is true that participation in this aspect of the AFDC program is clearly optional, 42 U.S.C. §607(b), it is noteworthy that the Congress felt it necessary to *specifically indicate* that the definition of the term "unemployment," an obviously ambiguous term susceptible of many possible interpretations,[7] was to be left to the states. It did not rely on the Government's theory of the Act proposed here, namely, that *all* terms not narrowly defined by Congress are left to state discretion. Indeed, the legislative history of that addition to the Act confirms that this grant of state discretion was an *unusual* one.

The Senate Report notes that:

> "The definition of the term 'unemployment' for the purposes of qualification for assistance under the bill is left to the states, just as the definition of 'need' has always been." S. Rep. No. 65, 1961 *U.S. Code Cong. and Admin. News*, p. 171.

Thus, state discretion to define the class of eligibles under §407, was compared to state latitude in defining need, latitude specifically granted the states in §401,[8] *not* to the discretion asserted in this case to define "continued absence," the parallel term to "unemployment" used to qualify the lack of support or care in §406.

Obviously, had Congress not included the term "as defined by the State" in §407, the natural consequence would have been a mandatory *federal* definition. When Congress wanted to depart from the general rule of federal eligibility

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[7] See, e.g., *Macias* v. *Finch*, 324 F. Supp. 1252 (N.D. Calif.), *aff'd*, 400 U.S. 913 (1970).

[8] *King* v. *Smith*, *supra*, 392 U.S. at 334; *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970).

criteria it surely knew how to do so unambiguously. In fact, doing so in 1961 with respect to "unemployment," was described by a later Congress, as a "major characteristic" of §407, responsible for "wide variations" in eligibility. Comm. on Finance, S. Rep. No. 744, 90th Cong., 1st Sess. (1967), p. 160.[9] Surely, then, the extent of state options to define "dependent child" suggested by the Government represents the unusual situation, applicable *only* where Congress has spoken specifically to the question.

While we do not concede that the term "continued absence" is in any way ambiguous, or subject to contrary interpretations, see point II, *infra*,[10] if in the judgment of the administering federal agency that is the case, its responsibility is to clarify the Congressional will, see, e.g., *Zuber* v. *Allen*, 396 U.S. 168, 197 (1969), and not abdicate that responsibility by passing it along to the states. Indeed, HEW did not find the Congressional command so unclear as to prevent it from defining standards for determining whether or not federal matching funds are to be made available on the basis of a "continued absence." See 45 C.F.R. §233.90(c)(1)(iii).

Moreover, the Department often finds it essential to the efficient administration of the AFDC program to clarify-

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[9] These remarks were made in connection with an amendment to §407 which now provides that the definition of "unemployment" is to be made by the Secretary of HEW. The Congress felt that the variations "worked to the detriment of the program." *Ibid.*

[10] Indeed, the plain meaning of "continued absence" is so apparent, that one can speak of a Congressional failure to "elaborate" only by first accepting the possibility that states may restrict the scope of the term. The particularization of acceptable reasons for a continued absence might well have called forth, under the doctrine of *ejusdem generis*, a judicial interpretation of the term that foreclosed its plain meaning, to wit, any and all continued absences.

Congressional terms apart from those used in §406. Thus, to cite only two examples, HEW has defined "earned income" as used in 42 U.S.C. §602(a)(8) as gross rather than net, see 45 C.F.R. §233.20(a)(7)(i), (a)(3)(iv)(a),[11] and "reasonable promptness" as used in 42 U.S.C. §602(a)(10) as thirty days, see 45 C.F.R. 206.10(a)(3).[12] None of these terms had self-evident meanings, but HEW exercised its responsibility, specifically delegated to it under 42 U.S.C. §1302,[13] to determine the meanings attributed to those phrases by the Congress. It has no less a responsibility, where it believes guidelines are necessary, to clarify the standards which must be followed in defining eligibility under §406.[14]

Finally, we must respond to the spectre of "sweeping changes" to the agency's administration of the program raised by the Solicitor General. The Government correctly points out that the equivalent to §402(a)(10) appears in each title of the Social Security Act, and each title follows

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[11] See *Connecticut State Dept. of Public Welfare* v. *HEW*, 448 F.2d 209 (2d Cir. 1971) and *Arizona State Dept. of Public Welfare* v. *HEW*, *supra*, in which HEW's interpretation was upheld.

[12] See *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971), in which this interpretation was upheld.

[13] Section 1302 provides that the Secretary of Health, Education and Welfare "shall make and publish such rules and regulations, not inconsistent with this [Act], as may be necessary to the efficient administration of the functions with which [he] is charged under [the Act]."

This delegation is a broad one. See *Thorpe* v. *Durham Housing Authority*, 393 U.S. 268 (1969).

[14] It is no answer that these statutory terms defined by HEW in mandatory terms appear in §402 rather than §406. The Government's argument in *Townsend* that the only mandatory requirements of the Act appear in §402, was obviously rejected by the Court, except insofar as §402(a)(10) is read to make the requirements of §406 mandatory.

the same general format as in Title IV,[15] and thus the *Townsend* decision may have a "significant impact on the degree of flexibility HEW allows to the states in implementing [the] definitional provisions of the Act." Memorandum of the United States, dated March 1972, p. 9. The extent of any such impact, however, must be determined on a case-by-case basis, and this Court should not conclude that an affirmance of the decision below will decide such questions.

Thus, if the legislative history should indicate, for example, that Congress expected that definitions of "blind" would be made by state governments, many of which probably already had such legal definitions in 1935, then *Townsend* would not compel a federal definition. On the other hand, if it should develop that Congress was silent with respect to the flexibility to be given the states under any particular provision, or Congressional intent cannot be discerned from the circumstances of the adoption of the particular provision, then the federal standard must govern, as it did in *King* and *Townsend*.[16] Any substantial departure from present administrative practice would merely be a consequence of the rejection by this Court in *Townsend* of the federal agency's failure to implement Congressional will. The battle to transform the Social Security Act from a grant-in-aid program into a revenue

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[15] Title I (OAA), Title IV (AFDC) and Title X (AB) were part of the original enactment in 1935. Title XIV (APTD) was added in 1950 at the same time as §402(a)(10) and its parallel provisions.

[16] For example, the APTD program was added to the Act at the same time as the addition of the disability segment to the Title II Social Security program was first considered. The phrase "permanently and totally disabled" was extensively discussed in connection therewith, and it would require an analysis of that history to determine the extent of state options in that situation.

sharing measure has already been lost by HEW. State control over the ultimate costs of the public assistance program must be exercised in relation to the level of benefits provided to eligible individuals, a matter totally within state domain, e.g., *Rosado* v. *Wyman, supra; Dandridge* v. *Williams, supra,* not by excluding a class of eligible individuals from the program, e.g., *King,* 392 U.S. at 334; *Townsend,* 404 U.S. at 291-92.

II.

Uninterrupted military absences are continued absences within the meaning of Section 406.

Apart from the question of whether states may automatically exclude military absences from the scope of "continued absence" as a basis for AFDC eligibility, it is clear that HEW has construed the Congressional use of that term as encompassing such absences within its terms. Thus its regulation defining the scope of available federal matching defines "continued absence" as being an absence of either parent from the child's home as long as that absence interrupts or terminates the "parent's functioning as a provider of maintenance, physical care, or guidance for the child" and its "known or indefinite duration . . . precludes counting on the parent's performance of his function in planning for the present support or care of the child." 45 C.F.R. §233.90(c)(1)(iii). The federal definition clearly states that for purposes of AFDC eligibility the parent may be absent "for *any* reason, and he may have left only recently or some time previously." *Ibid.* (Emphasis added.)

This federal standard has been used by the Department since the first years of the federal program, see *Handbook of Public Assistance Administration,* Pt. IV, §3422.2,[17] and has specifically included military service as an example of a "continued absence" within the terms of that definition. *Ibid.* The record in this case shows that 22 states aid families of all servicemen if otherwise eligible, while two states aid only draftees, and two others aid draftees and enlistees who did so to avoid the draft. Appendix, pp. 78-79.[18] We believe that an examination of the words of the statute, its legislative history, and the nature of the problem posed for needy families by military service, all demonstrate that HEW has correctly defined the proper scope to be afforded the term "continued absence."

As this Court noted on the same day as it decided *Townsend,* the judicial construction of a statute properly begins "by looking to the text itself." *United States* v. *Bass,* 404 U.S. 336, 339 (1971). Section 406 defines "dependent child" as a needy, age-qualified child "who has been *deprived of parental* support or *care* by reason of the death, *continued absence from the home,* or physical or mental incapacity of a parent. . . ." (emphasis added). 42 U.S.C. §606(a). A fair reading of that provision would lead to the assumption that Congress intended that *whenever* a needy child loses the in-home care of one of his parents for a period of time

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[17] This provision of the HEW *Handbook* has been quoted in full in appellants' brief at pp. A2-A3. This definition of "continued absence" has been used by the federal government for matching purposes since at least 1946 (the date appearing on our looseleaf version of the regulation), and perhaps earlier.

[18] Five states did not respond to the survey upon which this tabulation was based.

not expected to be interrupted by the parent's return to the home, he is qualified for AFDC.[19]

Appellants believe that Congress used the term "continued absence" to mean a "substantial intra-familial disassociation" (Br. 17). Their regulation reflects this by requiring that apart from a parent's physical absence from the home, "a substantial severance of marital and family ties" must be found before a child qualifies for AFDC. EAS 42-350.1. The situations appellants describe may be generally characterized as divorce, separation, abandonment or desertion. In our view, if this is what Congress meant by "continued absence," these commonly used words were readily available to express its purpose. What appellants seek to read into §406 "is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." *Addison* v. *Holly Hill*, 322 U.S. 607, 618 (1944). Indeed, Congress has frequently legislated in AFDC with the problem of the severance of family ties in mind, and in so doing it uses the common expressions for such situations. See, e.g., 42 U.S.C. §602(a)(17) (referring to AFDC children who have "been deserted or abandoned by [a] parent").

The circumstances under which Congress adopted the AFDC program in 1935 confirm the broad scope of "continued absence from the home" which is indicated by the plain meaning of its terms. Although the Solicitor General disclaims knowledge of any legislative history which bears upon the scope to be given to that term (Br. 7), we believe

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[19] "Continued" means "lasting or extending without interruption." Webster's Seventh New Collegiate Dictionary (1969), p. 181. "Absence" is the state of being "absent" or "not present or attending." *Id.* at 3. Thus, "continued absence from the home" means not being present in the home without interruption.

that its meaning can be readily discerned from an examination of the evolution of §406 in the original Social Security Act.

The original Administration proposal for AFDC defined "dependent child" to mean

> "children under the age of sixteen in their own homes, in which there is no adult person, other than one needed to care for the child or children, who is able to work and provide the family with a reasonable subsistence compatible with decency and health."

H.R. 4120, 74th Cong., 1st Sess. (1935), §203 of the proposed "Economic Security Act." The target of the President's program was thus simply stated to be needy families in homes with only one parent physically present. No eligibility requirement was proposed as to particular *reasons* which would have to be established for the presence of only a single parent in the home. This made sense in light of the philosophy behind the proposal, namely that the remaining parent must be freed from the wage-earning role (which would otherwise have been necessary in light of the family's below subsistence income) in order to provide the "physical and affectionate guardianship necessary, not alone to keep [the children] from falling into social misfortune, but more affirmatively to rear them into citizens capable of contribution to society." Report of the Committee on Economic Security (1935), p. 36. That philosophy is inconsistent with a limitation of the program to cases in which the parent is absent because of marital strife.

The House Committee on Ways and Means reported to the House a substantially modified version of the Presi-

dent's program. In the House bill (H.R. 7620), "dependent child" was defined to mean any

> "child under the age of sixteen who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in a residence maintained by *one or more* of such relatives as his or their own home." (Emphasis added.) Section 406 of proposed "Social Security Act."

Under the House bill, then, in order to qualify for aid the needy child had to be living with a near relative, but strikingly more liberal than the Administration's original proposal, was the inclusion of needy children in homes in which *both* parents were present. Such a bill, which passed the House, would have in effect been a general relief program for all needy families with children under 16 years of age had it been enacted.[20]

The proposed Act was again modified when it reached the Senate floor. The Finance Committee amended §406 to limit the definition of "dependent child" to include needy children under 16 living with a near relative only when the child "has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent." Under the Com-

[20] Despite the inclusion of intact families in H.R. 7620, the Committee Report indicates that a major concern of the House was the "families lacking a father's support. . . . Nearly ten per cent of all families on relief are without a potential breadwinner other than a mother whose time might best be devoted to the care of her young children." H. Rep. 615, 74th Cong., 1st Sess. (1935), p. 10. The Committee specifically noted that there were over 350,000 families on relief the head of which was a "widowed, separated, or divorced mother and whose other members were children under 16." *Ibid.* Nonetheless, the Committee, and the House, did not limit the proposed program to such families.

mittee proposal, which was accepted by the Senate and enacted into law, Pub. L. 74-271, 74th Cong., 1st Sess. (1935), §406, families in which both parents were healthy, and resided at home with the children, were rendered ineligible. The choice of the expression "continued absence from the home" was not accidental.

The Finance Committee described the beneficiaries of its proposal as "the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children." S. Rep. No. 628, 74th Cong., 1st Sess. (1935), p. 17.[21] These were the children who could "not be benefited through work programs or the revival of industry." *Ibid.* See *King* v. *Smith, supra,* 392 U.S. at 328. The Committee specifically noted that these families were "principally," but not exclusively, "families with female heads who are widowed, divorced, or deserted." S. Rep. No. 628, p. 17.

That the Senate was concerned with a far greater problem than marital dissolution is evident from the explanation for the confining amendment to the House bill offered by the Finance Committee:

> "'Dependent child' . . . by committee amendment, is further confined to only those . . . children who have been deprived of *either parental support or parental care* because a parent of the children has died, or is *continuously away from the home,* or is unable, due to physical or mental incapacity, to provide such support

[21] This language is remarkably similar to the statutory language proposed by the Administration in H.R. 4120, which, as we have shown, did not restrict the circumstances under which AFDC would be available except to require that there be "no adult person in the home other than one needed to care for the child."

> or care. Thus, if a baby's father were an imbecile, unable even to care for the baby at home, the baby would be a 'dependent child' even though it had a mother who had a job, for the baby would be *without normal parental care.*" (Emphasis added.) S. Rep. No. 628, p. 36.

This history indicates the following: first, that while recognizing that a large group of beneficiaries were lacking a father's support because of divorce or desertion, the committee targeted for assistance those children with a parent who was "continuously away from home," *without limitation;* second, and perhaps explaining this broad scope of coverage, the addition of the words "deprived of parental . . . care" was obviously important to the legislative purpose, and indicated Congress was concerned not only with the financial needs of the nation's children, but also their physical and emotional care.[22] This latter concern echoes the original proposal by the Administration and the recommendation of the Committee on Economic Security set out above, and focuses upon the *fact* that some needy children were deprived of parental care, not the underlying *reason* for such deprivation.

The bill as enacted, then, in rejecting the general relief approach of the House, nonetheless focused on a broad class of needy children, those deprived of "normal parental care" because one parent was either dead, incapacitated or not physically present in the home. There is no support in any

[22] Thus, the Committee believed a child eligible because he was "without normal parental care" when the father was in the home but incapacitated, even though the mother was employed. Surely the scope of "continued absence" must be read consistently with this view of the statutory purpose—*i.e.* all children deprived of "normal parental care" (because only one healthy parent lives at home) are eligible.

of this legislative history, as conceded by the Solicitor General (Br. 7), for HEW's view that states were intended to be given broad latitude in defining the scope of parental absences which would qualify needy families for AFDC. Under *Townsend,* then, the federal standard must govern. This history does support, however, the HEW regulation which considers parental absence for *any* reason to be acceptable, as long as such absence interrupts the "parent's functioning as a provider of maintenance, physical care, or guidance for the child," 45 C.F.R. 233.90(c)(1)(iii), and it confirms that children deprived of that support and care because of a father's military service are so included.

The typical problems faced by families in which the father is serving his country in the Armed Forces demonstrate why it would not make sense to judicially limit the broad scope which the plain meaning of "continued absence" would seem to require. These problems coincide with the very problem the 1935 Congress sought to remedy.

Thus, whether or not a particular father is drafted or enlists (perhaps in recognition that the draft will inevitably call),[23] the fact is that such service precludes him from remaining at home. Indeed, under applicable federal regulations, there are many duty stations at which a serviceman's family may not be with him[24] even if it chooses to dislocate and move nearby to his base.[25] This enforced absence obviously deprives the "military orphan" of his

[23] In fact, two states (Iowa and Vermont) limit AFDC in cases of military absences to families of draftees and enlistees who have enlisted to avoid the draft. Appendix, p. 79.

[24] Department of Army Regulation, AR 614-30.

[25] Such dislocation would involve, for example, taking children out of their usual school and separating them from their friends.

father's care, affection and guidance no less than if his father had deserted or separated from his mother, and thus he is deprived of "normal parental care" in the words of the Senate Finance Committee in 1935.[26]

The situation of the serviceman's family should be compared to the family of a convicted felon in California.

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[26] The Executive Branch recognizes the dislocation which can result to a family because of the removal of the father from the home and thus the President, as authorized by Congress in 50 U.S.C. App. §456(b), has provided for a deferment from military service for young men whose induction would result in "extreme hardship" to certain of their relatives who are dependent upon them for support. 32 C.F.R. §1622.30 (the so-called III-A deferment). In the consideration of such a dependency claim, any allowances which are payable by the United States to the dependents of such persons are to be taken into consideration, but the fact that they are payable is not by itself sufficient to remove the grounds for deferment even when the dependency is based upon financial considerations. Moreover, and more important to this case, where the claim of hardship is based upon other than financial considerations—for example, the deprivation of care supplied by the registrant to his dependents—the fact that such allowances are payable *"shall not* be deemed to remove the grounds for deferment," because such deprivation of care cannot be remedied by mere financial assistance to the dependents. 32 C.F.R. §1622.30; 50 U.S.C. App. §456(h). Indeed, until quite recently, one could be eligible for a hardship deferment merely by establishing that he was a father (or about to become a father sometime within the next nine months) and that he maintained a *bona fide* family relationship in his home with his child or children. 32 C.F.R. §1622.30(c). Hence the Government clearly acknowledges that the deprivation of care in and of itself can present a hardship to the family of a serviceman. It must be emphasized, however, that under selective service regulations a father must establish "extreme hardship" in order to become eligible for a III-A deferment, a burden which is difficult to establish. See, *e.g., United States ex rel. Wilkinson* v. *Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968).

Thus, in cases such as appellees', where deprivation of support *and* care is clearly substantial, but not "extreme," the child or children must suffer that deprivation. However, it is unlikely that Congress in providing for deferment from compulsory military service in cases of "extreme" hardship, would approve of an interpretation of §406 which is so restrictive as to deny subsistence benefits in cases of less severe, but substantial, deprivations.

Under the California definition, a parent is considered continually absent when "not legally able to return to the home because of confinement in penal or correctional institution." EAS 42-350.22. Obviously appellants themselves recognize that marital discord is irrelevant in determining whether or not there is a deprivation of parental care by virtue of the parent's absence from the home. The lack of logic behind the exclusion of military absences is not explained by reference to the prisoner's legal inability to return, for the serviceman suffers from the identical disability.[27] The absurdity of the exclusion is demonstrated by the fact that if a father receives a draft notice but refuses to submit to induction, thereby subjecting himself to a possible prison sentence, 50 U.S.C. App. §462, his family would qualify for AFDC.

In addition to the deprivation of normal parental care imposed on children by their father's military service, such service usually results in a deprivation of support as well, since woefully inadequate pay levels for enlisted men generally result in a lowering of the family's available income.[28] Indeed, Congressional committees, and the Pres-

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[27] The penalties for being absent without leave, or for desertion are serious. 10 U.S.C. §§885, 886.

[28] The basic pay level for enlisted men who have served less than four months (*i.e.*, new recruits) is $134.40 per month (little more than $1600 per year). Executive Order No. 11577, 36 Fed. Reg. 349 (January 8, 1971). For men (at the lowest rank) serving greater than four months but less than two years, the basic pay level is only $143.70 per month (little more than $1700 per year). *Ibid.* Under authority granted by Congress, 37 U.S.C. §701(d), the Secretary of the Army has authorized servicemen to "allot" from their pay for the support of their "dependents" a certain monthly sum which is then mailed directly to them. That amount is computed as follows: (1) a basic "quarters" allowance of $105 per month, regardless of the number of dependents, available only if

ident, have cited the necessity of servicemen's families seeking welfare in order to gain support for increases in military pay.[29] Congress could hardly be assumed to have excluded military absences *per se* from the term "continued absence," given the fact that military service is so often responsible for creating financial need.

The family faced with such a substantial decrease in its standard of living is in precisely the same situation as the needy family in which the parents are divorced or separated.[30] The mother must choose to deny her children the parental care they require in order to supplement their available, but substandard, income by employment,[31] or

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the serviceman makes an allotment of this allowance plus $40 per month, plus (2) the $40 per month (or any greater amount elected by the serviceman). See 50 U.S.C. App. §§2203, 2204 (The Dependents' Assistance Act of 1950, as amended by Pub. L. 92-129, §206, 85 Stat. 359). Thus, assuming an election to deduct $40 per month from his pay, the family of the serviceman will receive $145 per month, *regardless of its size.* (This may be compared to the AFDC standard of need in California for a family of four of $321 per month.) It is important to recognize that if the serviceman elects to make an allotment, his basic take-home pay is reduced by at least $40, and thus he receives only $93 (less than 4 months service) or $103 (less than 2 years service), hardly enough for his own needs.

[29] See, for example, Sen. Armed Services Comm., Report on H.R. 6531, S. Rep. No. 92-93, 1971, *U.S. Code Cong. & Admin. News,* 2129, 2180 [Supplemental Views of Messrs. Symington, Schweiker, and Hughes]; Message of the President, H. Doc. No. 91-324, 116 Cong. Rec. 12824, 12825 (1970).

[30] Assuming support payments are regularly sent to the mother and children, such a family still qualifies for AFDC if the amount of such support is less than the recognized level of "need" set by the state, although such actually available income is of course taken into consideration just as the amount of a military allotment is.

[31] While the current AFDC program permits states to require (when certain preconditions are met) mothers to accept suitable employment, it does so *only* when child care arrangements can be found which are adequate for the needs of the particular child. See 42 U.S.C. §§602(a)(15)(B), (19); 630 *et seq.*; 45 C.F.R.

remain at home and provide the needed care at severe financial loss.[32] As in the case of the "substitute father" owing the child no legal duty to support, the work relief program designed as the alternative to cash assistance could have been of no benefit to a family where the father is not present in the home, and unable to benefit therefrom. See *King* v. *Smith, supra,* 392 U.S. at 328; *Stoddard* v. *Fisher, supra,* 330 F. Supp. at 571 and n. 8.[33]

In sum, the net result of California's interpretation of "continued absence," which purports to focus on marital

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§220.35(a)(2)(v). Substantial federal funds have been made available since 1962 to facilitate the provision of such day care services, see, *e.g.*, 42 U.S.C. §§603(a)(3)(A); 622(a)(1)(C); 625, but it is well recognized that sufficient facilities are woefully lacking. See, *e.g.*, Comm. on Ways and Means, Report on H.R. 1, H. Rep. No. 92-231. 92nd Cong., 1st Sess. (1971), p. 166. Moreover, effective July 1972, mothers with children under six are *exempt* from this requirement, and states will be required to give first priority in placement of mothers in jobs to mothers who *volunteer*. 42 U.S.C. §§602(a)(19)(A), 633(a), as amended by P.L. 92-223, §3.

[32] Congress has attempted to relieve at least some of the financial dislocations caused by military service by its enactment of the Soldiers and Sailors Relief Act, 50 U.S.C. App. §501 *et seq.*, which provides for the suspension of the enforcement of civil liabilities in certain cases of persons who are in military service, in order to enable them to devote their entire energies to the defense of the nation. For example, one provision of this Act prohibits any eviction from premises which have an agreed rent of no more than $150 and which are occupied chiefly for dwelling purposes by the family of a serviceman while he is serving in the military. 50 U.S.C. App. §530. While this Act provides help to servicemen and their families in at least some instances, most of its provisions serve only to delay enforcement of civil liabilities until the serviceman's return home and so at best provide only temporary relief from the financial dislocations caused by military service.

[33] Indeed, while in service the fathers have no ability to bargain for adequate pay, obtain a second job, or look for a better one. Appellants' reliance on *Macias* v. *Finch, supra,* is thus misplaced. In addition, apart from the economic possibilities open to the "father in the house," his children are *not* deprived of his "parental care" as in the case of servicemen's families.

discord, rather than the financial and emotional needs of the children, is to separate needy children into two classes, distinguishable only with respect to the underlying reason for the parent's absence from the home. Congress, in establishing a program designed to provide "economic security and protection of *all* children deprived of parental support or care,"[34] *King*, 309 U.S. at 330, could hardly have intended "arbitrarily to leave one class of destitute children entirely without meaningful protection." *Ibid.*[35] Indeed, basing a classification on the parents, rather than the deprivation of the child, might well violate the equal protection clause, e.g., *Smith* v. *King*, 277 F. Supp. 31 (M.D. Ala. 1967), and such a construction of the federal statute ought to be avoided. *Townsend* v. *Swank*, 404 U.S. at 291.

We do not mean to suggest that military service *per se* should qualify families for AFDC. In some cases the service may be of very short duration (*e.g.*, summer National Guard duty), or the family may be able to easily, without severe dislocation, live at the place of service with the father (*e.g.*, assignment to a base reasonably close to home and schools). The question of "continued absence" *vel non*, however, like all other eligibility questions under the federal statute, must be decided on a case-by-case basis, taking into consideration all facts which bear upon satisfaction of

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[34] As this Court noted in *King*, Alabama's focus on the morality of the parents rather than the needs of the child was inconsistent with the Act since "protection of [dependent] children is the paramount goal of AFDC." 309 U.S. at 325.

[35] If California is particularly aggrieved by the problem of servicemen's families moving to the nearest point of embarcation, the remedy is not to distort the entire public assistance program by carving out an exception to the broad mandate of "continued absence," but rather a legislative one. Congress has legislated in the past to relieve communities suffering financial stress because of the presence of federal "enclaves," 20 U.S.C. §236 *et seq.*, and California may seek relief from that body, where its influence is substantial.

the *federal* criteria. Irrebuttable presumptions, such as the one California uses in defining active duty in the armed forces as a "temporary" absence, EAS 42-350.11,[36] are merely "transparent fictions," *King*, 392 U.S. at 334, which facilitate the state's avoidance of its responsibility to consider each case on its merits under the federal standards.[37]

CONCLUSION

The Court should affirm the judgment below and hold that the federal standard of "continued absence" is mandatory upon states participating in the AFDC program, and that such standard includes "military absences" within its scope.

Respectfully submitted,

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[36] Curiously, imprisonment, usually for a fixed period, is not considered "temporary." In any case, the statute says "continued" absence, *not "permanent."* Cf. 42 U.S.C. §1351 *et seq.* (APTD).

[37] Cf. *Damico* v. *California, supra; Doe* v. *Schmidt, supra.*